IN THE

Supreme Court of the United States

October Term, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,
Appellants,

vs.

M. RUSSELL TURLEY, ROBERT H. STIEVATER,
Appellees.

APPEAL FROM THE FINAL JUDGMENT OF A THREE JUDGE U. S. DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT B. JOHN TUTUSKA

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BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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Opinion Below

The opinion of the three man United States District Court sitting in the Western District of New York was rendered on April 28, 1972, and is set out in the record.

Jurisdiction

Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

Statutes Involved

The provisions of law involved in this case are: the Fifth and Fourteenth Amendments of the United States Constitution and Sections 103-a and 103-b of the New York General Municipal Law and Sections 2601 and 2602 of the New York Public Authorities Law. Because of their length, the texts of those provisions are set out in Appendices A, B and C to this Brief.

Question Presented

Insofar as relevant to the present case, Section 103-a of the New York General Municipal Law provides that in any contract for goods or services awarded by a municipal corporation a clause shall be included to the effect that upon the refusal of the contractor (or a member, partner, director or officer of the contractor) when called before a grand jury to testify concerning any contract or transaction with a public entity or to waive immunity against subsequent criminal prosecution, any outstanding public contracts of the contractor may be cancelled and the contractor shall be disqualified from bidding on public contracts for a period of five years. The question presented in this case is whether the statutorily-required contractual provision is constitutionally valid as applied to architects who had entered into a contract for services to Erie County containing such a clause but later declined to waive immunity in a grand jury investigation of corruption in transactions with the County.

Statement of the Case

Respondents are architects who were parties to public contracts with various governmental entities within the State of New York. In February, 1971, Respondents were subpoenaed to appear before an Erie County Grand Jury which was investigating corruption in certain transactions with the County. At the time of their appearance they were requested to sign a waiver of immunity from subsequent criminal prosecution but declined to do so.

Section 103-a of the New York General Municipal Law requires every municipal contract for goods or services to contain a clause providing that refusal by the contractor (or a member, partner, director or officer of the contract) when called before a grand jury to testify or to sign a waiver of immunity against criminal prosecution concerning contracts or transactions with public agencies will be grounds for cancellation of outstanding municipal contracts and disqualification as a bidder on municipal contracts for five years thereafter. Section 103-b of the General Municipal Law provides for such disqualification without reference to the required contractual clause. Sections 2601 and 2602 of the New York Public Authorities Law impose similar requirements, with some minor differences not relevant to the present case, in respect to contracts with public authorities. See also New York State Finance Law, Sections 139-a and 139-b.

Respondents brought suit seeking both a declaratory judgment that the statutory provisions for cancellation and disqualification were violative of their Fifth Amendment rights and a permanent injunction against enforcement of the statutes. A three-judge court was convened and on April 28, 1972, ordered the relief sought by appellees. This is an appeal from that order.

Summary of Argument

In a series of recent decisions, this Court has established that a public employee cannot be discharged for invoking his privilege against self-incrimination and refusing to testify about his conduct in office without immunity from criminal prosecution. The question in the present case is whether that principle should be extended to public contractors. We submit that the principle should not be so extended. The validity of a requirement that a person waive his privilege against self-incrimination as a condition to eligibility for contractual relations with public entities must logically and necessarily be judged by a balancing test. A statutory requirement that public contracts contain a provision that refusal to waive immunity shall be ground for cancellation of outstanding public contracts and disqualification from public contracts for a period of five years represents a reasonable balance between public interest in the integrity of the contracting process and the interests of the individual against self-incrimination. The requirement does not constitute an unreasonable condition to the public contract relationship and therefore is not unconstitutional.

POINT I

The constitutionality of the statutory conditions to public contracts is to be determined by a balancing test.

This case presents essentially a question of the constitutionality of a condition to the enjoyment of a public benefit. During the last two decades, this Court has developed a considerable but still incomplete body of doctrine in relation to "unconstitutional conditions". The earlier notion, predicated on the right-privilege distinction, that public employment and other benefits extended by government,

since they might be withheld altogether, could validly be made subject to any conditions which the State might choose to impose has been abandoned. The classic statement of that idea is found in the dictum of Mr. Justice Holmes in *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N. E. 517:

> "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

The evolution of the doctrine of unconstitutional conditions has taken place both in cases involving First Amendment freedoms and in cases involving the Fifth Amendment privilege against self-incrimination. In *Weiman v. Updegraff*, 344 U. S. 183 (1952), the Court held unconstitutional an Oklahoma statute which required every state employee, as a condition of employment, to execute an oath to the effect that he was not affiliated with any organization which had been listed by the United States Attorney General as subversive. The Court held:

> "Under the Oklahoma Act, the fact of association alone determines disloyalty and disqualification; it matters not whether association existed innocently or knowingly. To thus inhibit individual freedom of movement is to stifle the flow of democratic expression and controversy at one of its chief sources. * * * Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process" (344 U. S. at 190-191).
>
> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory" (344 U. S. at 192).

In subsequent cases, the Court established a stricter standard of review of conditions to public employment

which restrict First Amendment freedoms, examining them not merely to determine whether they are "patently arbitrary or discriminatory," but subjecting them to a rigorous balancing test. In *Shelton v. Tucker,* 364 U. S. 479 (1960), the Court declared unconstitutional an Arkansas statute which required every teacher, as a condition to employment in a state-supported school or college, to file annually an affidavit listing every organization to which he had belonged or regularly contributed within the preceding five years. The Court held:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose" (364 U. S. at 488).

The balancing process was made even more explicit in *Pickering v. Board of Education,* 391 U. S. 563, 568 (1967), in which the Court, in an opinion holding unconstitutional the dismissal of a public school teacher for a public letter critical of the Board of Education, framed the issue as follows:

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected. *Keyishian v. Board of Regents, supra* [385 U. S. 589 (1967)] at 605-606. At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

In the decisions concerned with conditions to employment whose effect is to restrict the privilege against self-incrimination, as distinguished from freedom of association and expression, the reasoning and language of the Court have not been so carefully refined. In *Garrity v. New Jersey,* 385 U. S. 493 (1967), the Court reversed the conviction of municipal police officers based upon self-incriminating statements they had given under circumstances where refusal to speak would have entailed the loss of their jobs. Referring to the dictum of Mr. Justice Holmes in *McAuliffe v. New Bedford* quoted above, the Court held:

> "The question in this case, however, is not cognizable in those terms. Our question is whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."
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> * * *
>
> "We conclude that policemen, like teachers and lawyers are not relegated to a watered-down version of constitutional rights."
>
> * * *
>
> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."

In *Gardner v. Broderick,* 392 U. S. 273 (1968), the Court held that dismissal of a police officer solely for refusal to waive immunity in a grand jury proceeding would violate his constitutional privilege against self-incrimination. The Court held:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to

the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra,* the privilege against self-incrimination would not have been a part to his dismissal.

"The facts of this case, however, do not present this issue. Here, petitioner was summoned to testify before a grand jury in an investigation of alleged criminal conduct. He was discharged from office, not for failure to answer relevant questions about his official duties, but for refusal to waive a constitutional right. He was dismissed for failure to relinquish the protections of the privilege against self-incrimination. The Constitution of New York State and the City Charter both expressly provided that his failure to do so, as well as his failure to testify, would result in dismissal from his job. He was dismissed solely for his refusal to waive the immunity to which he is entitled if he is required to testify despite his constitutional privilege."

In *Sanitation Men v. Sanitation Commissioner,* 392 U. S. 28 (1968), decided the same day as *Gardner v. Broderick,* the Court held that petitioners had been wrongfully discharged as sanitation employees, in violation of their constitutional privilege, for refusal to testify before the New York City Commissioner of Investigation in an investigation of charges of official misconduct. In the majority opinion, it was reasoned:

"But here the precise and plain impact of the proceedings against petitioners as well as of § 1123 of the New York Charter was to present them with a choice between surrendering their constitutional rights or their jobs. Petitioners as public employees are entitled, like all other persons, to the benefit of the Constitution, including the privilege against self-incrimination. *Gardner v. Broderick, supra; Garrity v. New Jersey, supra. Cf. Murphy v. Waterfront Commission,* 378 U. S. 52, at 79 (1964). At the same time, petitioners, being public employees, subject themselves to

dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

The above-quoted language in *Garrity*, *Gardner*, and *Sanitation Men*, could be taken, on its face, to mean that no conditions can be attached to public employment that could not be imposed directly upon private citizens through the police power. We submit, however, that no such sweeping effect was or could have been intended. To reduce the proposition to absurdity, a public employee could hardly argue that he cannot be discharged for failure to report regularly to his place of work simply because he cannot constitutionally be imprisoned without arrest on probable cause or conviction of a crime. The absolute and facile right-privilege doctrine has been rejected. It should not be replaced by an equally absolute and facile doctrine of unconstitutional conditions that refuses to recognize legitimate public interests in the relationship to which the condition attaches. As stated by Professor Van Alstyne:

> "The basic flaw in the doctrine is its assumption that the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not connected with government."
>
> • • •
>
> ". . . the weakness of the unconstitutional conditions doctrine was that in its very ease of application it failed to attach any significance to the legitimate public purposes which any regulation might serve. In contrast *Shelton v. Tucker* quite carefully focuses on the competing interests involved." Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 Harvard Law Review 1439, 1448, 1451 (1968).

Professor Van Alstyne's point has been explicitly recognized in a passage already quoted from a First Amendment case, *Pickering v. Board of Education, supra:*

> "it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

If restriction of First Amendment freedoms by conditions to public employment are subject to a balancing test, then it is difficult to see why the Fifth Amendment privilege against self-incrimination should not be; certainly it does not stand on any higher constitutional plane. As recently as *Cohen v. Hurley,* 366 U. S. 117 (1961), which was overruled in 1966 by *Spevack v. Klein,* 385 U. S. 511 (1967), the self-incrimination clause was held not applicable to the states through the Fourteenth Amendment. We submit that conditions to public employment whose effect is to restrict the privilege against self-incrimination—like those whose effect is to restrict First Amendment freedoms—are subject to a balancing test and that the rather broad language of some of the recent decisions was intended only to establish that public employees enjoy the protection of the Bill of Rights and may not be deprived of those rights simply because the restriction is framed as a condition to employment rather than as a police power regulation.

POINT II

As judged by a balancing test, the statutory provisions for cancellation and disqualification from bidding are not unreasonable conditions to public contracts and do not violate the privilege against self-incrimination.

The statutory provisions under review in the present case impose conditions to public benefits that are quite different from those rejected by the Court in *Gardner, Sanitation Man, and Garrity.* Considering both the public interest in the condition and its impact upon individual rights, a balancing of the competing interests at stake results in an opposite conclusion.

Considering first the public interest in the condition, it is to be noted that Appellees, precisely because they are not in an employment or master-servant relationship with a public entity, are subject to relatively little control in the performance of their public duties. In the employment relationship, the employee is subject to detailed, day-to-day supervision and control; and the public employer has reasonably adequate opportunities to safeguard against misconduct and protect the public interest. In contrast, an independent contractor enjoys a high degree of autonomy in the performance of his contractual public obligations and the opportunity of government to assure the proper performance of those obligations through non-criminal means is correspondingly restricted. (Moreover, many public contracts—though not those for architectural services—must be awarded through competitive bidding, and government has very little discretion in its choice of the contractor.) If the public is to be assured of the integrity and efficiency of the services it performs through contracts, the contractor must be held accountable to free

disclosure, and, if guilty of criminal misconduct, to appropriate sanctions. Five years is a reasonable period in which to complete an investigation. Disqualification for that period is a reasonable means to protect the contracting process against a contractor unwilling freely to account for his dealings with the public.

Considering the impact upon the individual, it may be noted that in each of the public employment cases, the sanction imposed for refusal to testify was loss of livelihood. The severity of that sanction was stressed in the opinions of the Court. In *Garrity*, the Court viewed the problem as one of the voluntariness of self-incriminating statements made by the police officers and observed:

> "The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."

Similarly in *Spevack v. Klein*, 385 U. S. 511 (1967), which held the self-incrimination clause of the Fifth Amendment applicable to the states by reason of the Fourteenth and reversed a judgment disbarring a lawyer for refusing to testify in proceedings brought against him for professional misconduct, the Court stressed:

> "the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it [the privilege against self-incrimination]".

Spevack v. Klein is also distinguishable from the present case on grounds noted by the Court in *Gardner v. Broderick*, *supra* at 278:

> "Unlike the lawyer who is directly responsible to his client, the policeman is either responsible to the State or to no one".

In *Spevack*, the State was acting in a regulatory or police-power capacity. To allow it to require a waiver of the privilege against self-incrimination in the exercise of its regulatory capacity would be to open the door to a potentially unlimited abrogation of the privilege. In contrast, to allow the state to require an accounting by its contractors, without grant of immunity, as a condition to further eligibility as a contractor does not entail that unlimited possibility and does not result in consequences different from those likely to occur within the private sector.[1]

In the present case, the sanction is not loss of an entire livelihood but only of public contracts and only for a period of five years. Public entities may be an important source of business for professional architects. They are not, however, the sole source of business. Since each contract is an independent transaction, disqualification from bidding for a period of five years does not impair future contracts and does not disrupt a continuing and exclusive relationship.[2] Appellees can continue their livelihood, subject only to a five year disqualification from public contracts. The consequence of refusal to waive the privilege against self-incrimination is far less severe than the loss of livelihood on which *Gardner*, *Sanitation Men*, *Spevack*, and *Garrity* were predicated. (We recognize that the impact

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[1] *Cf. The Supreme Court, 1967 Term*, 82 Harvard Law Review 63 at 209: "the Court's distinction between employees and licensees may reflect the tradition of allowing the government freedom approaching that of a private employer when dealing with its employees while holding it to a stricter standard when its interest is regulatory in nature".

[2] We assume that the statutes in question would not be construed so as to permit the contractor to be called again to testify on the same subject at the end of the five year disqualification period and then subjected to a further five year disqualification. It may be noted that excepting for "class A" felonies, comprising murder, kidnapping, and first degree criminal possession and first degree criminal sale of dangerous drugs, the statute of limitations for felonies in New York State is five years. N. Y. Criminal Procedure Law § 30.10.

in any individual case will depend upon its particular circumstances. But we submit that constitutional principles of this kind should be based upon a determination of their probable general impact and that the impact of the condition as attached to public contracts will in general be significantly less restrictive of individual rights than as attached to public employment.)

The privilege against self-incrimination does not protect against all adverse consequences from a refusal to testify; it protects only against criminal prosecution. In *Ullmann v. United States*, 350 U. S. 422 (1955), the Court in sustaining the validity of the Immunity Act of 1954, rejected the claim that a witness who had been granted immunity against subsequent criminal prosecution could refuse to testify on the ground that his testimony might lead to loss of employment, general public opprobrium and other seriously adverse effects upon his economic and social position. In language recently quoted with approval in *Kastigar v. United States*, 406 U. S. 441 (1972), the Court stated as to the privilege:

> "that its sole concern is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to criminal acts." (350 U. S. at 438-439)

The same principle is expressed in the caveat stated in *Gardner v. Broderick, supra* at 278:

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal."

In the case of a public employee, it appears that the employee may be compelled to testify against himself on pain of losing his job only if he is not at the same time required to waive immunity. For the reasons already stated, however, we submit that in the case of a public contractor, the state should not be required, in order to oblige him to account for the performance of his contractual obligations, to grant him immunity from criminal prosecution and thereby to forego recourse to the criminal sanctions designated to maintain the integrity of the contracting process. If a contractor is unwilling without immunity to account for his actions in relation to his dealings with public agencies, then it is not unreasonable to cancel his contract and disqualify him from bidding on public contracts for a period of five years.

It is to be noted that the effect of the statutory conditions is not in itself to compel the contractor to waive immunity. He cannot be compelled by sanctions of contempt or criminal penalties to testify against himself. The effect is only to provide that if he refuses to testify without requiring the state to forego its normal criminal remedies he may be disqualified for a period of five years. We submit that that is not an unreasonable condition to a public contract and that it does not unconstitutionally deprive Appellees of their constitutional privilege.

Conclusion

For the reasons stated, the judgment should be reversed.

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APPENDIX A

Constitution of the United States

Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges or immunities of citizens of the United States;* nor shall any *State* deprive any person of life, liberty, or property, *without due process of law;* nor deny to any person within its jurisdiction *the equal protection of the laws.*

APPENDIX B

New York General Municipal Law

§ 103-a. Ground for cancellation by municipal corporations and fire districts.

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or any public department agency or official thereof, for goods,

work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty. As amended L. 1968, c. 1032, § 1; L. 1970, c. 694, § 4; L. 1971, c. 268, §4, eff. May 18, 1971.

§ 103-b. Disqualification to contract with municipal corporations and fire districts.

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department or other city agency,

which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer and any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state,

political subdivision thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

As amended L. 1968, c. 420, § 125; L. 1968, c. 1032, § 2; L. 1970, c. 694 § 5; L. 1971, c. 268, § 5, eff. May 18, 1971.

APPENDIX C

New York Public Authorities Law

§ 2601. Ground for cancellation of contract by public authority.

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract,

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid. As amended L. 1970, c. 694, § 7; L. 1971, c. 268, § 7, eff. May 18, 1971.

§ 2602. Disqualification to contract with public authority.

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, the organized crime task force in the department of law, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant questions concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a

period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the organized crime task force in the department of law, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry.

Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

As amended L. 1970, c. 694; L. 1971, c. 268, § 8, eff. May 18, 1971.